



OFFICE OF THE POLICE COMMISSIONER
ONE POLICE PLAZA • ROOM 1400

February 6, 2019

Memorandum for: Deputy Commissioner, Trials

Re: **Lieutenant John Pizzano**
Tax Registry No. 921027
Police Service Area Viper Unit
Disciplinary Case Nos. 2017-17366

The above named member of the service appeared before Assistant Deputy Commissioner David S. Weisel on September 18, October 11, 12, and 22, 2018, and was charged with the following:

DISCIPLINARY CASE NO. 2017-17366

1. Said Lieutenant John Pizzano, while on-duty and assigned to the Support Services Bureau, on or about and between June 29, 2016 and February 15, 2017, at 1 Police Plaza, engaged in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: on approximately seven (7) dates said Lieutenant Pizzano utilized a Department gym while on paid overtime assignments, for an approximate total of four hours and twenty-six minutes (4:26).

P.G. 203-10, Page 1, Paragraph 5

P.G. 203-05, Page 1, Paragraphs 1 & 2

P.G. 205-17

**PUBLIC CONTACT –
PROHIBITED CONDUCT
PERFORMANCE ON DUTY -
GENERAL
OVERTIME**

2. Said Lieutenant John Pizzano, while on-duty and assigned to the Support Services Bureau, on or about and between November 21, 2015 and December 23, 2017 at 1 Police Plaza, engaged in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: on approximately sixteen (16) dates said Lieutenant Pizzano was present in a Department gym, without permission or authority, while on paid overtime assignments.

P.G. 203-10, Page 1, Paragraph 5

P.G. 203-05, Page 1, Paragraphs 1 & 2

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P.G. 203-10, Page 1, Paragraph 5

P.G. 203-05, Page 1, Paragraphs 1, 2 & 4

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**PUBLIC CONTACT –
PROHIBITED CONDUCT
PERFORMANCE ON DUTY –
GENERAL
OVERTIME**

4. Said Lieutenant John Pizzano, while on-duty and assigned to the Support Services Bureau, on or about and between November 12, 2015 and February 13, 2017, at 1 Police Plaza, engaged in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: on approximately one hundred thirty-seven (137) occasions during regular hours of police duties said Lieutenant Pizzano was present in a Department gym and failed to sign-in and/or sign-out of the Headquarters Cardiovascular Fitness Center Sign-In Log.

P.G. 203-10, Page 1, Paragraph 5

P.G. 203-05, Page 1, Paragraphs 4

**PUBLIC CONTACT –
PROHIBITED CONDUCT
PERFORMANCE ON DUTY –
GENERAL**

5. Said Lieutenant John Pizzano, while on-duty and assigned to the Support Services Bureau, on or about and between October 2, 2015 and February 28, 2017, at 1 Police Plaza, engaged in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: approximately two hundred twelve (212) occasions said Lieutenant Pizzano engaged in a pattern or practice of leaving his post early or arriving late without documenting his activities, without seeking supervisory approval and without submitting Leave of Absence Reports.

P.G. 203-10, Page 1, Paragraph 5

P.G. 203-05, Page 1, Paragraphs 1 & 2

**PUBLIC CONTACT –
PROHIBITED CONDUCT
PERFORMANCE ON DUTY –
GENERAL**

6. Said Lieutenant John Pizzano, while assigned to the Support Services Bureau, on approximately thirteen (13) occasions, on or about and between December 1, 2015 and February 15, 2017, wrongfully made or caused to be made inaccurate entries in Department records, to wit: overtime slips, in that said Lieutenant improperly submitted overtime slips that inaccurately stated he had worked certain amounts of overtime periods when he had not done so.

P.G. 203-05, Page 1, Paragraphs 4

P.G. 205-17

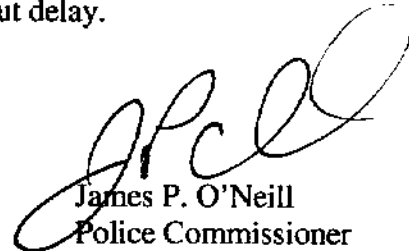
P.G. 203-10, Page 1, Paragraph 5

**PERFORMANCE ON DUTY -
GENERAL
OVERTIME
PUBLIC CONTACT -
PROHIBITED CONDUCT**

In a Memorandum dated December 26, 2018, Assistant Deputy Commissioner David S. Weisel found Lieutenant Pizzano Guilty of Specifications 1 and 6 and Guilty In Part of Specification Nos. 2 through 5 in Disciplinary Case No. 2017-17366. Having read the Memorandum and analyzed the facts of this matter, I approve the findings, but disapprove the penalty.

I have considered the totality of the misconduct to which Lieutenant Pizzano was found Guilty and Guilty In Part of, and deem that a penalty of vacation days and restitution is warranted.

It is therefore directed that a post-trial negotiated agreement be implemented with Lieutenant Pizzano, in which he shall forfeit thirty (30) vacation days, be deducted four hours and twenty-six minutes (4:26) from his pensionable time, pay restitution in the amount of three hundred ninety-nine dollars (\$399.00), and be placed on one (1) year dismissal probation. If Lieutenant Pizzano does not agree to the terms of this negotiated agreement as noted, this Office is to be notified without delay.



James P. O'Neill
Police Commissioner



POLICE DEPARTMENT

December 26, 2018

In the Matter of the Charges and Specifications

- against -

Lieutenant John Pizzano

Tax Registry No. 921027

Police Service Area Viper Unit

Case No.

2017-17366

At: Police Headquarters
One Police Plaza, 4th Floor
New York, NY 10038

Before: Honorable David S. Weisel
Assistant Deputy Commissioner Trials

APPEARANCES:

For the Department: Samuel Yee, Esq.
Department Advocate's Office
One Police Plaza, 4th Floor
New York, NY 10038

For the Respondent: John Arlia, Esq.
Wenger & Arlia, LLP
20 Vesey Street, Room 210
New York, NY 10007

To:

HONORABLE JAMES P. O'NEILL
POLICE COMMISSIONER
ONE POLICE PLAZA
NEW YORK, NEW YORK 10038

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CHARGES AND SPECIFICATIONS

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P.G. 203-05, Page 1, Paragraphs 1 & 2

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PERFORMANCE ON DUTY -
GENERAL

P.G. 205-17

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OVERTIME PERSONNEL MATTERS

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P.G. 205-17 OVERTIME PERSONNEL MATTERS
P.G. 203-10, Page 1, Paragraph 5 PUBLIC CONTACT - PROHIBITED CONDUCT
GENERAL REGULATIONS

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before the Court on September 18, October 11, 12 and 22, 2018. Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. The Department called Sergeant James Petrosky as its witness. Respondent called Deputy Commissioner Robert Martinez, Deputy Inspector Christopher Ikone, Lieutenant Dennis Bowman, Sergeant Frank Galasso, retired Department member Cesar Malde, and Inspector Louis Luciani as witnesses. Respondent also testified on his own behalf. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

After reviewing the evidence presented at the hearing, and assessing the credibility of the witnesses, the Court finds Respondent Guilty of Specification Nos. 1 and 6, and Guilty in Part of Specification Nos. 2 through 5.

FINDINGS AND ANALYSIS

Introduction

Respondent is a 20-year veteran of the Department, having spent the last five and a half years of his career working in the Support Services Bureau as the designated personnel officer. Several commands fall under the purview of SSB, including the Property Clerk, Fleet Services and Central Records Divisions, and the Printing Section, at multiple locations throughout the City. Only about 15 employees regularly work at One Police Plaza.

Respondent was involved in a wide range of tasks and projects and given latitude to work a flexible schedule and perform significant amounts of overtime. Though supervisors approved his overtime, Respondent was trusted to determine the most efficient schedule to ensure the timely completion of his various tasks. It was not uncommon for him to work

14 hours or more in a day with pre-tour and post-tour overtime, and he sometimes did full overtime tours on his day off.

These charges arose in January 2017 out of an anonymous letter to the Internal Affairs Bureau. The letter alleged that Respondent was spending significant time at the Headquarters Fitness Center located at One Police Plaza. Respondent's swipe card activity was reviewed, along with the fitness center sign-in log, the Support Services command log, and the overtime slips Respondent submitted for compensation. The investigation revealed multiple occasions where Respondent swiped into the gym during times that he was being compensated for overtime. There also were numerous occasions where Respondent swiped into the gym, both on overtime and during regular working hours, without signing the gym's paper log.

Respondent does not dispute the swipe activity. He acknowledged seven occasions where he spent his meal period at the gym, contending that he forgot exactly what time he took the meal and ended up putting in for overtime during this period. In essence, his argument is that if he had structured his straight time and overtime hours differently on his slip, there would be no issue, as he was entitled to a meal on straight time. He further asserts that many of the swipes and failures to sign in were the result of his briefly entering the fitness center for various reasons, but not going into the actual gym to work out. He contends he thus was not obligated to sign in.

The investigation expanded into reviewing Respondent's comings and goings in and out of One Police Plaza. Swipe activity revealed that on over 200 occasions, Respondent either swiped in or out between 6 and 26 minutes before or after the scheduled start or end of either his regular or overtime tour. On some dates, he is alleged to have both come in late and departed early. Respondent does not dispute the swipe activity, but asserts that

these inconsistencies can be explained by legitimate work-related activity in the annex garage before or after he had swiped at the One Police Plaza turnstiles.

Respondent also claims that he has been disparately treated, or perhaps more accurately, that these charges and the recommendation that he be terminated are the result of unfair bias against him by the Department Advocate's Office. In sum, he suggests that Sergeant Frank Galasso, who was and is now again assigned to the Department Advocate's Office, used his positive working relationship with Inspector Louis Luciani, DAO's commanding officer, to influence the Advocate's Office to take a hard line with Respondent.

Respondent believes that this influence was the result of animosity that built up when Galasso was assigned to SSB. Galasso was close with another supervisor, Lieutenant Anthony Cucuzza, who did not have a positive working relationship with Respondent. Respondent also reported misconduct on Galasso's part, shortly before the anonymous letter was received, resulting in Galasso's transfer out of SSB and ultimate return to DAO. Respondent suggests that the expanded investigation, multiple sets of amended charges, and the upgrading of the penalty offer from vacation days to forced separation support his argument of disparate treatment or bias.

Testimony and Evidence

The Department presented what it characterized as primarily a "paper case," calling just one witness, **SERGEANT JAMES PETROSKY**, the assigned IAB investigator on this case. Petrosky detailed that IAB received an anonymous letter alleging that Respondent was frequently working out at the Department fitness center on both straight time and overtime. As the assigned investigator, Petrosky obtained various records (Tr. 52-56).

Petrosky obtained Respondent's CityTime and swipe records, showing when Respondent entered and exited One Police Plaza as well as when he entered the fitness

center (see Dept. Exs. 1 & 2, swipe activity for Oct. 1, 2015, to July 31, 2016, and Aug. 1, 2016, to Feb. 21, 2017, respectively; Tr. 46).

Petrosky also obtained paper sign-in and sign-out records for the gym, explaining that gym members had to both swipe in with their Department ID and sign in and out on a paper log (see Exs. 3, selected fitness center sign-in sheets for Aug. 19, 23, Sept. 19, Oct. 20, Dec. 23, 2016, & Feb. 11, 2017, reflecting dates where Respt. swiped in on overtime; Ex. 4, complete fitness center sign-in sheets from Aug. 1, 2016, to Feb. 21, 2017; Ex. 5, IAB Mar. 17, 2017, worksheet memorializing that fitness sign-in sheet was obtained, and flagging certain dates where Respt. swiped in on overtime; Ex. 6, request from IAB seeking fitness sign-in sheets for additional dates in 2015 and 2016; Ex. 7, selected fitness sign-in log sheets from Aug. 1, 2016, to Feb. 21, 2017, where Respt. swiped in on overtime; Ex. 8, Aug. 24, 2017, request from IAB seeking fitness sign-in sheets for additional dates in 2015 and 2016; Ex. 9, complete fitness sign-in sheets from Nov. 12, 2015, to July 31, 2016; Tr. 46-48).

Finally, Petrosky reviewed Respondent's work schedule, overtime slips, and the SSB command log (see Ex. 10, Respt.'s CityTime work schedule, including overtime, from Nov. 2015-Feb. 2017; Ex. 11, selected overtime slips [range of 13 dates spanning Dec. 2015-Feb. 2017]; Ex. 12, SSB command log; Tr. 48-49).

Based on information extracted from the swipe records and CityTime, Petrosky compiled a chart of Respondent's ID reader history, listing times swiped in and out of One Police Plaza from October 1, 2015, through March 21, 2017, alongside his scheduled tour and any overtime for which he was compensated. For dates beginning November 18, 2015, the times that Respondent signed in and out of his command log were also listed. Prior to that, there was no command log in the Support Services Bureau. Petrosky denoted times

when Respondent arrived late or departed early in excess of five minutes from the start or end of his scheduled tour or what he reported as overtime (Tr. 49, 63-67; Ex. 13, chart).

Of the 195 work dates listed on this chart, Respondent is listed as arriving between 6 and 13 minutes late on 36 occasions. He left between 6 and 26 minutes early on 178 occasions. 21 of those dates contain both late arrivals and early departures. Petrosky detailed that the chart was presented to Respondent during an official interview on December 6, 2017, and he indicated that he did not recall why he would have arrived late or left early on those dates. The sole exception was January 25, 2016, where Respondent departed over two hours early. Respondent indicated that he must have worked at another location that day if he departed that early. Petrosky accepted that explanation, not counting this date against Respondent. Petrosky conceded at trial that Respondent was not given time during the interview to consult other records that might have helped him refresh his recollection (Tr. 67-69, 86-87, 94-95).

Petrosky also prepared a chart outlining Respondent's fitness center usage from November 12, 2015, to February 17, 2017. The information in the chart was compiled using swipe records and the paper sign-in sheets from the relevant dates compared against Respondent's scheduled tour and any overtime he submitted. One hundred dates where Respondent swiped into the gym were listed on the chart. On 20 of those dates, Respondent was working overtime either when he swiped into the gym or for part of the time that he was in the gym based on his sign-in and sign-out times. The Advocate had Petrosky specifically review the information for the following dates, where Respondent swiped into the gym during times that he was compensated for overtime:

- **Dec. 3, 2015:**
 - Respondent swiped into the gym at 0818 and 1002 hours; he did not sign in or out on the paper sheet.

- His tour was 0915x1800 hours; he worked overtime from 0730 to 0915.
- **Jan. 18, 2016:**
 - Respondent swiped into the gym at 0840 hours; he did not sign in or out.
 - His tour was 0915x1800 hours; he worked overtime from 0645x0915.
- **Mar. 4, 2016:**
 - Respondent swiped into the gym at 1644 hours; he did not sign in or out.
 - His tour was 0400x1245 hours; he worked overtime from 1245x1900.
- **Mar. 24, 2016:**
 - Respondent swiped into the gym at 1647 hours; he did not sign in or out.
 - His tour was 0400x1245 hours; he worked overtime from 1245x1900.
- **Apr. 12, 2016:**
 - Respondent swiped into the gym at 1658 hours; he did not sign in or out.
 - His tour was 0400x1245 hours; he worked overtime from 1245x1900.
- **Apr. 18, 2016:**
 - Respondent swiped into the gym four times, at 0513, 1402, 1602, and 1820 hours; he did not sign in or out.
 - His tour was 0430x1315 hours; he worked overtime from 1315x1900.
- **June 29, 2016:**
 - Respondent swiped into the gym at 1610 hours. He signed in at 1615 and signed out at 1710 hours.
 - His tour was 0805x1650 hours. He worked overtime from 1650x1910.
- **July 20, 2016:**
 - Respondent swiped and signed into the gym at 1540 hours. He signed out at 1635 hours.
 - His tour was 0400x1245 hours; he worked overtime from 1245x1900.
- **Aug. 19, 2016:**
 - Respondent swiped and signed into the gym at 1835 hours. He signed out at 1915.
 - His tour was 0940x1825 hours; he worked overtime from 1825x2000.
- **Aug. 25, 2016:**
 - Respondent swiped into the gym at 1644 hours. He signed in at 1650 hours and signed out at 1745.
 - His tour was 0400x1245 hours; he worked overtime from 1245x1945.
- **Sept. 19, 2016:**
 - Respondent swiped into the gym at 0642 hours. He signed in at 0640 hours and signed out at 0720.
 - His tour was 0715x1600 hours; he worked overtime from 0400x0715 and 1600x2400.
- **Oct. 26, 2016:**
 - Respondent swiped into the gym at 1658 hours. He signed in at 1700 hours and signed out at 1740.
 - His tour was 0745x1630 hours; he worked overtime from 1630x1830.

- **Dec. 23, 2016:**
 - Respondent swiped into the gym at 0442 hours; he signed in at 0450. His sign-out was illegible.
 - His tour was 0915x1800 hours; he worked overtime from 0400x0915.
- **Feb. 15, 2017:**
 - Respondent swiped into the gym at 1652 hours. He signed in at 1655 hours and signed out at 1740.
 - His tour was 0845x1730; hours he worked overtime from 1730x2330.

(Tr. 69-80).

Petrosky noted that the Department did not flag dates where Respondent entered the fitness center prior to starting overtime and exited within 10 minutes of his overtime starting (this could only be if he signed out – otherwise there was no way of knowing when he left). Petrosky testified that he also discounted some days where there were multiple swipes, recalling specifically November 21, 2015, where Respondent said he was working on a project on the C level and had frequently used the gym restroom to wash his hands. Petrosky also discounted days where Respondent did a full overtime tour on his regular day off with one swipe into the gym, as he indisputably was entitled to a meal as it was essentially a regular tour. Petrosky acquiesced that there was no rule stating members must sign the gym log if only entering the area to use the bathroom (Tr. 80-84, 92, 95).

Petrosky agreed that there were approximately 88 occasions when Respondent was in the gym on his meal during non-overtime hours. With respect to the dates for which there were fitness center sign-in and -out times, Respondent never exceeded the allotted time for a meal period. The Advocate stated that it had been the case that members were allowed to attend the gym for their entire hour meal. Possibly due to this case, the allowable time was changed to 50 minutes (Tr. 28, 90, 100-01).

Petrosky confirmed that he had concluded his investigation into Respondent's gym usage by August 24, 2017. At that point, he was directed by the Advocate's Office to also

obtain and review Respondent's comings and goings for One Police Plaza itself, not just the fitness center. Petrosky confirmed that there was no video evidence to support the allegations of Respondent's leaving early or arriving late. He also agreed that Respondent's cell phone was "pinged," which corroborated times when Respondent indicated he had been working outside wire (Tr. 101-06).

Finally, Petrosky recounted that at his official Department interview, Respondent was asked about his working relationship with Cucuzza. Respondent characterized it as not "such a great one." This question was posed after Deputy Inspector Christopher Ikone, SSB's commanding officer, had alluded to animosity between the lieutenants in his interview. Cucuzza, who retired shortly after the investigation began, was not interviewed (Tr. 106-08).

As outlined above, Respondent testified on his own behalf. He did not dispute the accuracy of any of the Department's swipe records in evidence, nor of the gym sign-in log, but rather attempted to provide explanations and context to support his argument that no actionable misconduct was committed.

RESPONDENT testified that he was assigned to Support Services for five and a half years, before being modified the Friday before trial. He explained that though his official title in SSB was Personnel Officer, he performed a variety of tasks including data analytics, spreadsheet production, video production and heavy machinery operation. He described his workload as "very large," but manageable, noting that he was able to work a flexible schedule and perform significant amounts of overtime to ensure completion of time-sensitive special projects assigned by Deputy Commissioner Robert Martinez and Ikone. Often, he would be in the middle of one task when he was directed to begin working on a higher priority project. He testified that he was permitted to structure his schedule and

perform whatever overtime was necessary to get everything done in an efficient and timely manner (Tr. 395-99).

Respondent detailed that there often were days where he would do overtime both before and after his scheduled tour, sometimes sitting at his desk for a full tour and beyond without taking a meal. This prolonged sitting could cause him particular discomfort, as he had preexisting back issues, having undergone spinal surgery in 2013. When he could take a meal period, he utilized the Department gym to stretch and alleviate muscle tension with a foam roller. He was not required to maintain an activity log, and the SSB command log did not document meals, only daily arrivals and departures. Respondent testified that when filling out his overtime slips, he generally remembered when he took meal at the gym and documented it accordingly, but acquiesced that he might not have always precisely recalled his mealtime if he was filling out the slip a few days after the fact (Tr. 399-402, 461, 466).

With respect to signing into the gym, Respondent agreed that he "absolutely" would always sign in and out when he was actually using the fitness center to stretch or work out, which he estimated he did approximately three times weekly. He primarily used it for stretching, disputing any characterization that he was a "gym buff," and estimated he might have taken a fitness class approximately twice a month. He suggested that if he had swiped in but not signed the log, he was not actually using the gym but was there for some other purpose (Tr. 400-03, 416-17, 460-61, 490-91).

Respondent explained that there were many instances where he entered the gym without using it for fitness purposes or signing the log, most commonly when he utilized the bathroom. He testified that he frequently utilized the gym's locker room and bathroom to wash up after working on the C level in the Printing Section, or at the Central Records

Division storage location (run by GRM, a private company). He noted that the other restroom on the C level often was in a state of disrepair. He also would go down from his office to this bathroom sometimes if he needed to shave or brush his teeth. He was not comfortable doing so on other floors, having been chided by an executive-level member on one occasion in the 12th floor restroom. Respondent specifically recalled utilizing the gym bathroom several times on November 21, 2015, a day where he worked a full tour of RDO overtime on the GRM project, going through boxes of old personnel records, loading them into a truck and disassembling shelving. Beyond the bathroom, Respondent occasionally swiped into the gym without signing in when showing new members assigned to SSB around Headquarters, if he was retrieving an item, like a phone or razor, that he had left behind, to sign up for a fitness class that was taking place at a future time, or to drop off paperwork (Tr. 413-11, 493-96).

Respondent did acknowledge using the gym while being compensated for overtime on seven occasions, as confirmed by the sign-in log and outlined in Specification No. 1, characterizing it as an unintentional mistake. He emphasized that this time in the gym was his only meal period of the day and pointed out that on the majority of these dates, he was working more than 14 hours total. He believed that on these long days, he was actually entitled to two meal periods, but only took one while on overtime in the gym. He conceded, though, that he did not have specific permission to be in the gym on overtime and was not assigned to a 12-hour regular tour that would automatically entitle him to two 45-minute meals. He insisted that he had not purposefully intended to take his meal or go to the gym on overtime. Instead, he contended that he simply forgot what time he used the gym and did not fill out the overtime slips in a way that would have recorded that meal period in the gym as straight time (Tr. 402-12, 461-66).

Regarding Specification No. 5, the charge alleging over 200 late arrivals and early departures, Respondent stated that, at his initial official interview, having had no time to review the dates in advance, he offered no explanations other than to point to one specific date where he was alleged to have left two hours early, when in fact he departed to work at another SSB location. Respondent agreed that he still did not have specific recollections of each date, but confirmed generally that he did not have permission to come late or leave early on all of these dates (Tr. 417-20, 463-64, 476-78).

Respondent asserted that he could explain the majority of the discrepancies between his swipe activity and his actual regular and overtime tours by virtue of being in the annex garage dealing with Department vehicles. He testified, "There are many instances related to my job duties [] which continue after I leave the turnstile," most involving the garage. First, he explained that it could be difficult to find parking in the annex garage particularly if he had worked outside Headquarters at some point during the day. As such, his driver would sometimes improperly or double-park a Department vehicle. Respondent then would move it into a proper spot in the annex at the end of the day after the garage had cleared out before leaving for the night (Tr. 424-25, 472-73).

With respect to his job duties, Respondent detailed that he sometimes would load a Department vehicle with camera equipment at the end of the day if he was planning to go to another location to film a video the next day, sometimes moving the vehicle he intended to take the following day as well. He also was responsible for the Department's ceremonial vehicles, bringing them out and taking them for a service check on the day of an event and accounting for them afterward. Finally, Respondent ran data analytics on the underutilization of Department vehicles, including those rented confidentially by the Department for investigations, to determine the mileage, gas usage and other information

that could potentially ascertain cost savings. He stated that, on a weekly basis, even though he was not the Fleet Services liaison for SSB, he would go down to the annex garage at the end of the day with a legal pad and record the license plates of cars that appeared to be sitting dormant, based on the amount of dust they had accumulated. He subsequently would run the plates to see how that vehicle was being utilized and determine whether, if it was a rental, it could be returned, thereby saving the Department money. He suggested it was possible that he sometimes did this on overtime, in conjunction with completing other projects, meaning that he might have characterized his overtime slip as "personnel" related, even if he spent a portion of the time dealing with fleet issues (Tr. 424-31, 471-76, 487-88, 494-95).

Finally, Respondent provided a timeline of events that he felt underscored his claims of disparate treatment and unfair bias. He recounted that on January 25, 2017, he reported Galasso, who had been temporarily assigned to the SSB head office while on modified duty, to Ikone. Respondent's report regarded Galasso's failures to document his movement in the command log accurately. Respondent did not get along with Galasso and felt he was a liability to the bureau and distracted others from their job tasks. Respondent testified that his report led to Galasso's transfer to Fleet Services prior to his return to DAO after about a month. Respondent later learned that IAB received an anonymous letter alleging misconduct on his own part six days after he reported Galasso. Ultimately, Respondent received charges on August 24, 2017, which were amended and expanded on September 22 and December 7, 2017. In July 2018, Respondent received another set of amended charges, this time adding the specification dealing with leaving early and arriving late. During this time, he still was full-duty and helped to recover a stolen City vehicle. The Friday prior to trial, he was modified (Tr. 432-43, 450-52).

Respondent called his supervisors, Commissioner Martinez and Inspector Ikone, as well as the current and former Support Services ICOs, to corroborate parts of his testimony. He also called Galasso and Inspector Luciani in an attempt to flesh out his claims of bias and disparate treatment.

DEPUTY COMMISSIONER ROBERT MARTINEZ, the head of the Support Services Bureau, characterized Respondent's position as a "very universal spot . . . almost like a direct report of special projects." Respondent's responsibilities, he testified, were comprised of "whatever we give him to do in a given time," including gathering property and fleet statistics, developing new programs based off collected data and putting together presentations and videos for CompStat and similar programs. Martinez averred that the fleet-related statistics generated by Respondent caused certain Department vehicles to be re-assigned more efficiently, ultimately saving the Department millions of dollars (Tr. 118-19, 122).

Martinez agreed that it would not be unusual for Respondent to work sixteen hours in one tour, explaining that many of his assignments were time- and labor-intensive. He described Respondent as a person of integrity with a "phenomenal" work ethic and lauded his ability to complete projects efficiently with little supervision. With respect to scheduling, Martinez trusted Respondent completely and gave him whatever flexibility Respondent deemed necessary to complete a project by its deadline. When the instant matter arose and Martinez had the option of transferring Respondent, he declined to do so as he considered Respondent an asset to the bureau (Tr. 120-24).

Martinez was familiar with the fitness center on the C level. He agreed that when he would utilize the facility to work out, he would both swipe his ID for door access and sign in if he was working out. He noted though that he would not sign in if he entered the fitness

center area for other reasons, such as using the restroom, showing new employees around or speaking to gym employees (Tr. 129-30, 134).

Respondent's direct supervisor, **DEPUTY INSPECTOR CHRISTOPHER IKONE**, commanding officer of SSB, described Respondent as wearing "many hats" that required him to work significant overtime. He agreed that Respondent had "much latitude" in creating his own schedule of pre- or post-tour overtime, which Ikone approved. He trusted that Respondent was efficient in structuring his schedule. He also noted that there were times when Respondent was called back to the command after leaving for the day because of a time-sensitive project (Tr. 138-41, 144-45, 158, 200-03).

Ikone confirmed that as a general rule there are no meal periods on overtime. There is no proration, such that working two hours of overtime would entitle a member to 20 minutes of meal, for example. There are exceptions to this rule concerning exceptionally long details, like New Year's Eve (Tr. 204-05).

Ikone corroborated that at some point Respondent came to him with concerns about Galasso. Ikone testified that following his conversation with Respondent, Galasso received a command discipline and ultimately was transferred out of the command (Tr. 143-44).

Ikone believed that part of Galasso's issue with Respondent was Galasso "sid[ing]" with his supervisor, Cucuzza, who had a contentious relationship with Respondent. Ikone described Cucuzza as having a more relaxed approach to work, in contrast to Respondent's more regimented methods. At some point, a "very agitated" Cucuzza approached Ikone with the allegation that Respondent was spending a lot of time in the gym and presented a single piece of paper appearing to contain data outlining Respondent's swipes into the gym. Cucuzza did not explain where or how he obtained this document and Ikone did not ask.

Ikone "heard [both officers] out" and directed them to be professional in dealing with each other. As a result of this conversation, he directed Respondent and others under his supervision in May 2016 to use the fitness center only on their meal periods. He reiterated this directive in early 2017. Ikone acquiesced that he did not have his ICO investigate Cucuzza's allegation, nor did he refer the matter to the SSB Investigation Unit or IAB. He did not examine CityTime records to compare them against the swipe records presented by Cucuzza because he felt Cucuzza's allegation was colored by ongoing animosity, believing at the time that Cucuzza was "creating a smear campaign" against Respondent (Tr. 145-48, 178-81, 186-88, 196-99, 203-04).

Ikone further explained that the GRM project required Respondent to spend significant time on the C level supervising contract workers, who were assisting with document storage. Like Martinez, he testified that he occasionally had entered the gym just for the purpose of using the restroom, noting it is one of the nicest in One Police Plaza (Tr. 148-50, 178-81).

LIEUTENANT DENNIS BOWMAN joined Support Services as the ICO in August 2016. Upon his arrival in the command, Respondent showed him around to the 39 facilities that fall under the bureau, including taking him to create a training video. He remembered that it was difficult to find parking upon returning to Headquarters, and at times, Respondent would block another vehicle or otherwise park improperly, properly parking the vehicle later. Bowman sometimes also experienced similar parking difficulty and did the same (Tr. 212, 217-20, 229-31).

Respondent also showed Bowman around One Police Plaza, including the gym. Bowman did not feel the need to sign into the gym at that time as they were there only for a few minutes. Like other witnesses, he testified that he sometimes entered the gym solely to

use the recently renovated bathroom. He also remembered that there frequently was a sign on the door of the main C level men's room stating it was out of service and suggesting usage of the gym bathroom (Tr. 212-17, 229).

In 2017, Bowman was directed by Ikone to investigate Galasso for signing-out infractions after an allegation was raised by Respondent. His investigation revealed several occasions where Galasso failed to sign out accurately. At one point, Galasso asked Bowman whether he was under investigation and Bowman denied it. Bowman agreed Galasso was well aware it was Respondent that had reported him. Bowman believed that Ikone had informed Galasso that Respondent reported him for time issues (Tr. 222-24, 238-39).

Bowman did not recall exactly when Ikone made him aware of Cucuzza's allegation that Respondent was stealing time, but conceded that he did not commence an investigation or make referrals regarding the allegation. He had no knowledge of how Cucuzza obtained Respondent's swipe card activity, but it would have been outside Cucuzza's function to request such information (Tr. 227-28, 240).

Retired lieutenant **CESARIO MALDE** was the SSB ICO prior to Bowman. He testified that when he arrived at SSB, Respondent showed him around the building, including the gym. They were there for a few minutes and neither signed in. He also recalled that Respondent would, at times, swipe him into to the "nicer" restroom in the gym, particularly when they were both working on a project on the C level, moving boxes of Department records and breaking up shelves. Malde characterized the condition of the main restroom on the C level as terrible. He also remembered Respondent frequently going down to the gym bathroom to wash up. Malde testified that the 12th floor bathroom was not the best place to shave or brush teeth because there were only two sinks and that bathroom was frequented by several chiefs (Tr. 281-88).

Malde recalled that Respondent and Cucuzza had different supervisory approaches that caused disagreements, with Respondent being more "hard-nosed" and "by the book" and Cucuzza giving his sergeants "a lot of leeway." Malde was unaware of any knowledge that Respondent regularly left work before the end of his scheduled tour, though he acknowledged their cubicles were right next to one another. He concurred with others' testimony as to the difficulty finding parking at Headquarters and that Respondent sometimes would move vehicles to proper spots after the fact (Tr. 288, 293, 295-96).

SERGEANT FRANK GALASSO testified that he was assigned to the Department Advocate's Office for three years, working in the Litigation Support Unit, before being transferred to Support Services while on modified assignment. He returned to DAO approximately two years ago. Galasso agreed that he has a friendly relationship with the commanding officer of DAO, Luciani, with whom he had worked during both of his stints at DAO. He noted, though, that they have socialized only at Department functions (Tr. 252-55).

In Support Services, Galasso worked day tours and it was typical for him to spend a portion of the day in the office and the later portion at an auto pound. He explained that he would call the command to go end of tour from the auto pound and whoever answered the phone would sign him out. On January 26, 2017, while assigned to Support Services, Ikone advised Galasso that he was receiving a command discipline for failing to sign the command log properly. Galasso testified that he did not have any knowledge of Respondent or any other officer being the source of this complaint. When asked if he inquired of any supervisor, including ICOs, whether he was under investigation, Galasso answered, "I don't recall" (Tr. 257, 260-64, 271, 277).

Galasso knew his supervisor, Cucuzza, prior to being assigned to SSB, and they had a friendly relationship that included socializing outside work and spending time at one another's homes. Their relationship is no longer close and Galasso was unaware of why Cucuzza retired. He recalled Cucuzza expressing concern over Respondent spending time at the gym, but never stating that Respondent was stealing time. He denied that Cucuzza ever showed him any paper with Respondent's swipe activity. Galasso further denied ever subsequently accessing the details of Respondent's case or speaking with Luciani about his experiences with Respondent or the recommended penalty in Respondent's case. Galasso disagreed that he had a bad relationship with Respondent, recalling conversations about children and weight loss, but agreed they were not "work friends." He was not aware of any anonymous letter regarding Respondent's alleged misconduct (Tr. 257-60, 264-66, 271-72, 277-78).

INSPECTOR LOUIS LUCIANI stated that he had known Galasso for several years, since his first stint in DAO. During that time, he helped Galasso get a discretionary promotion prior to his transfer to the Detective Bureau. Their relationship was friendly, but socializing was limited to Department functions. In 2017, Galasso reached out to Luciani about being re-assigned to the office. Luciani was aware that Galasso had worked in SSB, but they did not discuss any "gripes" or issues he had there. He had no recollection of Galasso ever mentioning Respondent. Luciani also had no recollection of ever meeting Cucuzza. Luciani was, however, made aware that Galasso received a command discipline while in SSB, which made Luciani review his thought process on bringing Galasso back. Ultimately, they spoke and Galasso explained that he had not revealed this because he was embarrassed. Luciani explained that based on his previous history as a good employee in

DAO, Galasso was re-assigned to DAO's Civilian Complaint Review Board liaison unit at CCRB's 100 Church Street office (Tr. 306-19).

Regarding Respondent's case, Luciani first became involved when the previously assigned Advocate approached him to discuss the case. Luciani directed him to do a complete and thorough investigation of Respondent's comings and goings. Regarding the charges of lateness and early departures under fifteen minutes, Luciani explained that generally such misconduct is only charged when someone does so habitually, and it is generally not viewed as a "stealing time" situation. However, he explained that when overtime is involved, it is looked at "very seriously," as "stealing of money with that stealing of time" (Tr. 320-31).

Luciani confirmed his awareness of the original 30 vacation days penalty offer in this case, as well as his involvement in the decision to make it a separation case, explaining that the recommendation changed as the investigation revealed additional misconduct. It was his understanding that, in the Police Commissioner's view, officers in "high-profile positions, trusted positions" who engage in time theft should not remain with the Department. Luciani acknowledged that work history also was considered in fashioning a penalty recommendation. He denied that Galasso in any way influenced the decision to make Respondent a separation offer (Tr. 338-49, 357-58).

Luciani further detailed that he became aware only immediately prior to trial that Respondent still was on full-duty status. He characterized this as an oversight on his part and that of DAO's managing attorney. The Deputy Commissioner of DAO reminded Luciani that members should be placed on modified duty if the Department is seeking separation after a rejected offer (Tr. 336-37, 358-59).

Analysis

Before addressing each of the individual specifications, the Court will first deal with Respondent's claim that he was "disparately treated and selectively prosecuted . . . in a nefarious manner due to personality conflicts and issues" (Tr. 4). The essential thrust of this argument is that the Department Advocate's Office, and specifically Inspector Luciani, treated Respondent unfairly and disparately in large part due to his positive working relationship with Sergeant Galasso.

As outlined above, Galasso worked for Support Services both after leaving and prior to returning to DAO with Luciani's endorsement. Respondent, Ikone and Bowman all discussed how Galasso's receipt of a command discipline for movement signing infractions and transfer out of SSB was the result of Respondent reporting him. To varying extents, every witness was asked about Respondent's relationships with both Galasso and his supervisor and friend, Cucuzza. It is not disputed that Respondent and Cucuzza had a poor working relationship due to personality conflicts and differing approaches to their supervisory roles. It also is uncontested that Cucuzza somehow obtained a document with some of Respondent's gym swipe records and attempted to present them to Ikone several months before the IAB/DAO investigation commenced.

Respondent's counsel argued that the six-day timeframe between Respondent reporting Galasso and IAB's receipt of an anonymous letter alleging that Respondent was frequently working out on job time suggest that something untoward occurred. Counsel further contended that it was suspect that Respondent's charges were amended multiple times after Galasso's return to DAO and that the requested penalty became termination, when there had been an initial offer of 30 vacation days. Specifically, counsel emphasized that Luciani directed that the investigation be expanded from Respondent's gym usage to

his comings and goings generally and also was involved in having Respondent modified immediately before trial (Tr. 492-94).

It is apparent to the tribunal that there was significant animus between Respondent and Cucuzza. It is plausible that this strain adversely affected Respondent's relationship with Galasso, who was a subordinate, but a personal friend of Cucuzza, though Galasso disputed having issues with Respondent and further claimed he had no knowledge Respondent was involved in his receipt of a CD. At minimum, the established animus between Respondent and Cucuzza, along with Cucuzza's suspicious possession of some of Respondent's swipe records, and the timing of Respondent reporting Galasso relative to IAB's receipt of allegations against Respondent, certainly lends credence to Respondent's theory that one or both of them were involved in the submission of the letter to IAB.

Ultimately, though, the source of the letter is not material, because the only question relevant to this proceeding is whether Respondent established that he was treated disparately or unfairly by DAO.

For the following reasons, the disparate treatment defense fails. Respondent presented speculation, but no real evidence or information that would even remotely suggest Luciani was biased against him or inclined to treat him unfairly. Respondent called both Luciani and Galasso as witnesses and counsel questioned them at length in an attempt to establish any potential bias. While they both were forthright about the fact that they have a positive working relationship that spans several years, both steadfastly denied having discussions about Respondent or his case where Galasso would have encouraged Luciani to take a hard line with Respondent. Respondent's counsel points to Luciani directing that the investigation also look at Respondent's comings and goings, his

involvement in increasing the penalty recommendation and Respondent's recent modification as possible evidence to the contrary. But the Court is not inclined to agree.

While Respondent's frustration with those developments is understandable, it is logical and plausible that after the investigation into the gym swipes led to the flagging of so many dates over a long period of time, the Department would want to look more broadly at Respondent's comings and goings. The expanded investigation, combined with Respondent's rejection of an initial penalty offer consisting of vacation days only back in January 2018, sheds light on the upgraded recommendation to separation. The modification immediately prior to trial, rather than once Respondent rejected the separation offer, is inconsistent with the Department's usual practices but there was no evidence rebutting Luciani's explanation that it was an oversight that was caught as the case became a subject of focus by the Deputy Commissioner on the eve of trial.

In sum, Respondent established only that he had a poor relationship with Cucuzza, Galasso's supervisor and friend. He did not present actual evidence of disparate treatment or unfair bias against him by DAO. For that reason, the Court rejects the defense argument.

Specification Nos. 1, 2 & 6 – Time Spent in Gym on Overtime

Specification Nos. 1, 2 and 6 are closely related as they all deal with Respondent's swiping or being present in the gym while being compensated for overtime on specific dates.

Specification No. 1 charges Respondent with utilizing a Department gym while on paid overtime assignments, on seven dates, for an approximate total of 4 hours and 26 minutes, on or about and between June 29, 2016 and February 15, 2017.

The charged dates are:

- **June 29, 2016:** Respondent's regular tour was 0805x1650 hours. He submitted and was compensated for overtime from 1650x1910 hours. He signed into the gym at 1615 and signed out at 1710 hours. He was in the gym for a total of 55 minutes: the final 35 minutes of his regular tour and 20 minutes on overtime.
- **July 20, 2016:** Respondent's regular tour was 0400x1245 hours. He submitted and was compensated for overtime from 1245x1900 hours. He signed into the gym at 1540 hours and signed out at 1635 hours, spending 55 minutes of overtime in the gym.
- **August 19, 2016:** Respondent's regular tour was 0940x1825 hours. He submitted and was compensated for overtime from 1825x2000 hours. He signed into the gym at 1835 hours and signed out at 1915 hours, spending 40 minutes of overtime in the gym.
- **August 25, 2016:** Respondent's regular tour was 0400x1245 hours. He submitted and was compensated for overtime from 1245x1945 hours. He signed into the gym at 1650 hours and signed out at 1745 hours, spending 55 minutes of overtime in the gym.
- **September 19, 2016:** Respondent's regular tour was 0715x1600 hours. He submitted and was compensated for pre-tour overtime from 0400x0715 hours and post-tour from 1600x2400 hours. He signed into the gym at 0640 hours and signed out at 0720 hours, spending 40 minutes of overtime in the gym.
- **October 26, 2016:** Respondent's regular tour was 0745x1630 hours. He submitted and was compensated for overtime from 1630x1830 hours. He signed into the gym at 1700 hours and signed out at 1740 hours, spending 40 minutes of overtime in the gym.
- **February 15, 2017:** Respondent's regular tour was 0845x1730 hours. He submitted and was compensated for overtime from 1730x2330 hours. He signed into the gym at 1655 hours and signed out at 1740 hours. He was in the gym for 45 minutes: the final 35 minutes of his straight time tour and 10 minutes on overtime.

(DX 12).

Respondent acknowledged being in the gym while on overtime without authorization on these dates. He contended, though, that he did not intend to go to the gym on overtime. He said, rather, that it was his only meal period of the day and that he simply put his overtime period on the wrong end relative to his meal, which he spent in the gym, when he submitted for compensation. He further emphasized that on four of these seven dates, he had put in more than 14 hours at work and that on 88 other occasions during the time period specified in the charge, he submitted for overtime with no issue (Tr. 407-10; Respt. Ex. A, chart prepared by Respt. of all overtime worked from June 29, 2016, to Feb.

15, 2017; Rx. B, chart prepared by Respt. outlining acknowledged gym appearances on overtime and length of time worked those days).

Patrol Guide § 205-17, Overtime Personnel Matters, which Respondent is charged with violating, is silent regarding meals. Patrol Guide § 212-02, Meal Period (last revised Oct. 27, 2016), however, states that:

While on extended tour overtime for an arrest or other police necessity, a meal period may be granted by a supervisor to a uniformed member of the service only if their assigned meal period was denied during their regularly scheduled tour. . . . Absent exigent circumstances during extended tour overtime, uniformed members of the service who had taken their assigned meal period during their regularly scheduled tour may be granted a break or break periods commensurate with the expected duration of overtime.

The final sentence contemplates breaks while performing extended tour overtime. Respondent is not asserting that he took an additional break on overtime in addition to his meal, but rather that he took his meal on overtime, something that is explicitly prohibited unless a meal was denied (not just that it was not taken) during the regular tour. Respondent did suggest, though, that he also might have been entitled to an additional meal break based on the amount of overtime he was working.

Respondent, who was a supervisor in an administrative role with tremendous flexibility to fashion his schedule in whatever way he deemed most efficient, could have avoided this issue relatively easily either by making an adjustment to his regular tour time, which he did frequently, by going to the gym just a bit earlier or later or by seeking permission to take breaks of a certain length to stretch in the gym on overtime.

In any event, Respondent does not dispute that he was at the gym while on overtime without express permission or even the awareness of his supervisor on these dates. Accordingly by the plain language of this specification and Respondent's admission that he was in the gym, he is found Guilty.

At the same time, the Court takes note that Respondent was working long days in order to complete a multitude of projects for his command. It would not have been unreasonable for him to take a break as contemplated by the Patrol Guide. There also is no evidence refuting his testimony that these blocks of time at the gym, all of which were under an hour, were his single meal period of the day. According to his supervisors, he was a reliable and productive worker and there is no allegation that his work product or timetable was impacted in any way.

Specification No. 2 charges Respondent with being in the gym while on overtime on "approximately" 16 dates between November 21, 2015, and December 23, 2017. 2017 appears to be a typo that should actually read 2016, because this December 2017 date appeared on earlier sets of charges that predated December 23, 2017. Additionally, all records with respect to the gym do not go back further than February 15, 2017.

The swipe records reflect, and Respondent does not dispute, that he was present in the gym on overtime on 18 dates between November 21, 2015 and December 23, 2016. On seven of those dates, it is known that Respondent was actually utilizing the fitness center while on overtime because he signed in. Though Respondent acknowledges that he did not have permission to be there on overtime, he argues, as discussed above, that he simply erred in how he filled out his overtime slips, by not recording his time in a way that would have reflected the gym time meal period as occurring during the straight-time portion of his day, even though his supervisors gave him great flexibility in organizing his schedule.

With respect to the 11 additional dates for which there is no sign-in, one date was a full tour of overtime on Respondent's RDO. Petrosky explained that this date was not counted against Respondent because he would have been entitled to a meal period.

Petrosky also detailed that IAB had credited Respondent's explanation that his five swipes

into the gym on November 21, 2015, where he worked overtime on his RDO and swiped into the gym five times, including twice in one hour, were due to the fact that he was working near the gym on the C level on the GRM project. Respondent explained at trial that this was a messy project, involving breaking up shelves and sorting through dusty boxes of files, and required frequent hand washing. Within two weeks of that date, Respondent twice more performed RDO overtime that was coded under GRM, and on both of those dates, he swiped into the gym twice. It seems that these dates were not given the same benefit of the doubt as 21 November for reasons that were not made clear.

Taking out the three GRM dates and the RDO overtime meal in the gym, the tribunal is left with 14 dates where Respondent was in the gym on paid overtime. Respondent acknowledges being in the gym on overtime only on the dates which are confirmed by the sign-in sheets and suggests he has alternate explanations for being in the fitness center during times where he did not sign in, namely using the restroom but also possibly delivering paperwork or signing up quickly for a fitness class.

The bathroom explanation is credible to an extent for reasons that will be more fully discussed with respect to Specification Nos. 3 and 4, and the tribunal has given Respondent the benefit of that explanation with respect to the GRM project overtime dates. There are two dates, April 18 and May 7, 2016, where Respondent swiped into the gym on overtime twice in under 80 minutes and thrice in four hours respectively, where a defense of using the gym for non-fitness purposes would seem to be applicable.

It is quite striking, however, that the dates where Respondent does admit to being in the gym on overtime fall between July and December 2016, a period of time when Respondent was consistently signing the gym's sign-in and sign-out sheets and there is therefore a record of him utilizing the gym for workout purposes. The remaining dates in

question, where Respondent acknowledges swiping into the gym, but denies actually using the gym on overtime, fall between December 2015 and May 2016, a period of time where Respondent signed into the fitness center log only twice and never signed out, even though he swiped in close to 90 times. This leads the tribunal to believe, despite Respondent's testimony to the contrary, that at least during that period of time, it was not his practice to sign in even if he was utilizing the fitness center, which, according to his testimony, he did approximately three times weekly.

Based on his sign-in patterns and the information set forth in the testimony, the credible evidence indicates there were approximately 12 occasions where Respondent actually utilized the fitness center during overtime. Accordingly, the Court finds Respondent Guilty in Part of Specification No. 2.

It must be emphasized again, however, that the Court credits Respondent's testimony that this was not done with a nefarious intention to steal time, but was simply the result of Respondent, who frequently worked very long days and who was given great flexibility to alter his schedule from day to day and perform overtime as he saw necessary, erring in how he self-reported what portion of his day was straight time, what was overtime in relation to where he put his meal and failing to obtain any supervisory permission to take a break in the gym on extended tour overtime. Respondent is not alleged ever to have been in the gym for longer than one hour (a meal period) and there is no allegation that Respondent took a meal in addition to the period he was away from his office at the gym. While there is no way to truly be certain with respect to the days he did not sign in, it seems that it was not his practice to be in the gym for longer than one hour based on the sign-in records that are in evidence.

Specification No. 6 deals with the actual documenting of overtime. Respondent is charged with improperly submitting overtime slips, on approximately 13 occasions between December 1, 2015, and February 15, 2017, that inaccurately stated he had worked certain amounts of overtime periods when he actually was in the gym for a portion of the time. Six of these thirteen dates are the same dates charged in Specification No. 1 (with the exception of September 19, 2016). Also charged are six earlier dates where Respondent swiped into the gym while on overtime but did not sign in or out of the gym, giving the Department no way to determine exactly how long he was there. Those dates are December 3, 2015; January 18, March 4, March 24, April 12, and April 18, 2016. On all but one of those dates, Respondent swiped into the gym only once during his overtime hours. The exception is April 18, 2016, where he swiped in three times, each about two hours apart. The final charged date is December 23, 2016, where Respondent worked pre-tour overtime from 0400x0915 hours before starting his regular tour from 0915x1800. Respondent swiped into the gym at 0442 hours, signed in at 0450 hours and, though he did sign out, it was deemed illegible by the Department (see Dept. Ex. 11, selected overtime slips Dec. 2015-Feb. 2017; Dept. Ex. 14, chart prepared by IAB summarizing Respt.'s gym usage).

The overtime slips bear Respondent's signature certifying that the times he denoted as "overtime performed" were accurate. Respondent suggested that he sometimes filled out the slips days later and struggled to remember his meal time. This is undercut, however, by the fact that Respondent always dated the slips as the day the overtime was performed and with the exception of two slips, all the supervisor signatures are dated the same or the next day, indicating they were filled out close in time. Respondent's

supervisors described him as very meticulous. It therefore should be expected the dates on his slips were accurate as to when they were filled out.

Much like with Specification No. 2, on seven of the thirteen charged occasions, Respondent admitted that he was utilizing the gym during a portion of time he represented as "overtime performed," which is confirmed by the gym sign-in sheets. He does not, however, admit to utilizing the gym on the six earlier dates, for which there are no sign-in sheet entries. Those dates fall within a six-month period of time where Respondent swiped into the gym approximately 90 times, signing in only once. As outlined in the analysis of Specification No. 2, the tribunal is not persuaded by Respondent's assertion that the lack of sign-ins demonstrates he was not actually utilizing the fitness center. It is likely, though, that on April 18, 2016, where he swiped into the gym multiple times in a relatively short period, Respondent was entering the gym to utilize the restroom.

With respect to the other dates, the credible evidence indicates that Respondent submitted overtime slips that were inaccurate because he spent a portion of those overtime periods in the gym. It also is notable, as Respondent pointed out, that over 80 overtime slips were submitted in the charged time period, and these raised no issues regarding Respondent's accurate representations of overtime actually worked. The fact remains, however, that Respondent, a veteran officer and supervisor wholly and completely trusted with setting his own schedule and accurately representing his time, submitted multiple overtime slips indicating he performed overtime during blocks of time when he actually was in the gym without a supervisor's permission or knowledge. Accordingly, with the understanding that the number of overtime slips noted in the charge is "approximate," Respondent is found Guilty of Specification No. 6.

Specification Nos. 3 & 4: Failure to Sign Fitness Center Log

In contrast to Specification Nos. 1, 2 and 6, which deal with specific dates, Specification Nos. 3 and 4 deal with "occasions" that Respondent failed to sign in or sign out of the fitness center's paper log. Specifically, Specification No. 3 charges that Respondent failed to do so on approximately 20 occasions while present in the gym on overtime on or about and between November 21, 2015, and December 23, 2017. The Department did not make clear whether failure to sign in and out for the same swipe event counted as one or two "occasions." Once again, 2017 appears to be a typo, as all records with respect to the gym do not go back further than February 15, 2017.

Based on the evidence, between November 21, 2015, and December 23, 2016, Respondent, while on overtime, swiped into the gym on 20 occasions and failed to both sign in and out as follows:

- **Nov. 21, 2015:** Respondent was working a full RDO overtime tour coded under *0150 GRM project*.
 - He swiped into the gym on five occasions: 0550, 0713, 0752, 0835 and 1413 hours.
- **Nov. 28, 2015:** Respondent was working a full RDO overtime tour coded under *0150 GRM project*.
 - Respondent swiped into the gym twice, at 0719 and 1301 hours.
- **Dec. 3, 2015:** Respondent swiped into the gym during pre-tour overtime at 0818 hours.
- **Dec. 5, 2015:** Respondent was working a full RDO overtime tour coded under *0150 GRM project*.
 - Respondent swiped into the gym twice, at 0716 and 1455 hours.
- **Jan. 18, 2016:** Respondent swiped into the gym during pre-tour overtime at 0840 hours.
- **Mar. 4, 2016:** Respondent swiped into the gym during post-tour overtime at 1644 hours.
- **Mar. 24, 2016:** Respondent swiped into the gym during post-tour overtime at 1647 hours.
- **Apr. 12, 2016:** Respondent swiped into the gym during post-tour overtime at 1658 hours.
- **Apr. 18, 2016:** Respondent swiped into the gym on post-tour overtime on three occasions: 1402, 1602, and 1820 hours.

- **May 7, 2016:** Respondent was working a full tour of overtime coded under *0150 Budgeting/Analysis Report*.
 - He swiped into the gym on three occasions: 0523, 1508, and 1624 hours.

Specification No. 4 deals with entering the fitness center while on straight time.

Respondent is charged with failing to sign in or out of the log on approximately 137 occasions where he was in present in the gym during regular working hours, including meals, on or about and between November 12, 2015, and February 13, 2017. Based on the swipe and log records in evidence, Respondent failed to sign in *and* out of the gym on 67 occasions where he swiped in on straight time. He also failed to sign *out* on two occasions where he had both swiped and signed in. Finally, one sign-out time was marked as illegible. The 137 "occasions" therefore is 67 failures to sign in, 67 failures to sign out, 2 failures to sign out where he had signed in, and 1 illegible sign-out.

The tribunal is unpersuaded that all these failures to sign constituted misconduct. First, it should be noted that there is no stated rule that a member must sign into the fitness center if merely intending to use the restroom, sign up for a class, retrieve a left-behind item, ask a quick question of a staff member or drop off a document. In fact, that would make little sense, as the point of the log sheets logically would be to get an accurate record of actual exercise usage. Otherwise, the swipe records should be sufficient to ascertain mere presence.

With respect to overtime swipes, Petrosky stated that the five-swipe day of November 21, 2015, was not held against Respondent because IAB credited his explanation. Two of the other dates without sign-ins involved the same project, and on those dates, Respondent swiped into the gym twice each day. It also is unlikely that Respondent, while on overtime, was actually working out three separate times over the course of four hours on April 18, 2016, or twice in less than 80 minutes on May 7, 2016.

Similarly, with respect to straight time, there are several dates where Respondent swiped in twice in the span of two hours or less: November 16, December 1 and 15, 2015; January 8, 12, 15, February 4, 22 and 25, March 15 and 25, April 13 and 20, and May 3, 2016. All of this supports Respondent's testimony that he frequently entered the gym for other reasons, primarily to use the restroom, as he had work tasks on C level, and because it became his restroom of preference if he needed to shave or brush his teeth away from the executive setting of higher floors. Bowman, Malde, Ikone and Martinez all corroborated that the gym restroom was a more appealing option.

At the same time, the tribunal does not find it credible that every swipe into the gym without a sign-in meant that Respondent was not there to exercise. The fitness center sign-in sheets are an important means of attempting to track members' exercise use.

Respondent signed in just twice between November 2015 and June 2016, despite several dozen swipes during that time period and Respondent's own testimony that he utilized the fitness center a few times a week.

Based on the overall documentary and testimonial record, the Court concurs with the Department's assertion that Respondent failed to sign in or out of the fitness center on multiple occasions when he actually was utilizing the fitness center both on overtime and during his meal period on straight time.

The Court, however, is not persuaded that misconduct occurred on "approximately 20" overtime occasions or approximately "137" occasions during regular hours, given the logical and corroborated testimony about the frequency with which Respondent entered the fitness center to use the restroom. There is simply no way to "approximate" an exact number of occasions that Respondent swiped into the gym for fitness-related purposes versus how many were just brief entries into the gym for other purposes. There is no video

evidence of Respondent entering or exiting, there is no swipe-out mechanism to give the time elapsed between Respondent's entry and exit (in fairness to the Department, his failure to sign out also prevented knowledge of time between entry and exit), and Respondent credibly testified that he does not have individual recollections of these specific dates. There is no evidence to support any theory that Respondent was not signing in an effort to perpetuate time fraud or extend his workout times beyond the length of a meal period. It appears to have not been his regular practice to sign in until July 2016, when he regularly began signing the log.

Based on the limited information with respect to specific dates, the Court finds generally that there were a substantial number of occasions that Respondent entered the gym to stretch or work out and therefore should have signed in, as well as a substantial number of occasions on which he was only in the gym briefly, did not utilize fitness equipment and therefore was not obligated to sign the log. Accordingly, he is Guilty in Part of Specification Nos. 3 and 4.

Specification No. 5: Late Arrivals and Early Departures

Respondent is charged with engaging in a pattern or practice of leaving his post early or arriving late without documenting his activities, without seeking supervisory approval and without submitting leave of absence reports on approximately 212 occasions between October 2, 2015, and February 28, 2017. The relevant swipe activity indicates that nearly every day in the charged period of time, Respondent either arrived late for or departed early relative to the beginning or end of his scheduled tour or his submitted overtime period. The blocks of time in question range from 6 to 26 minutes. Respondent's entries in his command log did not always match his swipe activity, but consistently matched with either his scheduled tour or block of overtime for a given day.

Respondent disputed the Department's count, arguing that certain occasions were being counted against him as leaving between two and seven hours early, when he actually ended his tour outside wire working at another location (see Ex. D, earlier version of Dept. Ex. 13 with Respt.'s comments; Ex. E, Respt.-prepared version of Ex. D with commentary and alleged counting errors; Ex. F, Respt.-prepared chart summarizing alleged early departures; Tr. 444-49). He also alleged that the header columns were included in the count. This is not the case. Regardless of what was included on initial spreadsheets exchanged between counsel, the chart the Department entered in evidence (Ex. 13) struck these dates by blurring them out in gray.

Moreover, Respondent is not charged with leaving early or arriving late on 212 separate dates, but rather on 212 "occasions." Counting the days when Respondent both arrived late and left early by six minutes or more as two separate "occasions," there were, by the Court's count, 214 occasions.

Respondent did not dispute the accuracy of the swipe card reader and commendably acknowledged that he did not have individual recollections of each of these occasions. He suggested that a large portion could be explained by work he often did in the annex garage at the end of his tour, which, as discussed above, involved taking stock of Department rentals, ceremonial and other vehicles, in addition to moving cars that were improperly parked earlier in the day. He then would depart for the day directly from the garage, without returning to his command to sign out as he would do so prior to exiting the building.

The tribunal credits Respondent's testimony that surveying the garage for unused rental vehicles was part of his regular work routine. It aligns with the corroborated testimony that Respondent was a "go-to" officer in his command who performed a

multitude of tasks, including some related to vehicles, even if he was not the designated fleet administrator, and helped save the Department money due to his careful record-keeping with respect to vehicles.

It also would make practical sense to leave tasks like taking inventory of vehicles, loading equipment for the next day, or moving improperly parked vehicles to the end of the day when there would be fewer cars in the garage and Respondent would be on his way out anyway. As such, it is certainly reasonable that this activity would account for at least some of the numerous early departures.

The issue, however, is that in doing so Respondent caused a significant amount of discrepancies between his swipe activity and the command log. This undermines the objective of the command log, which is to accurately track an officer's comings and goings. Without video evidence, neither the Court nor the Department can know exactly or even approximate how many occasions where Respondent swiped out before his scheduled end of tour can be attributed to legitimate work in the garage and should not be considered misconduct.

What is not credible, in any event, is Respondent's insistence that over 200 early departures and late arrivals all could be attributed to a legitimate work-related task. Respondent's early departures, both on straight time and overtime, were extremely frequent. In 2016, in fact, there does not appear to be a single day where Respondent did not either leave early or arrive late, or both, irrespective of whether he was working straight time or overtime. Respondent, who was setting his own schedule, which included significant amounts of overtime nearly every day, was trusted to account for his time accurately. It appears to this tribunal that Respondent was lax in ensuring that he stayed to

the very end of his tour and being precise in his representations regarding when he came and went. Thus the Court finds Respondent Guilty in Part of Specification No. 5.

PENALTY

In order to determine an appropriate penalty, Respondent's service record was examined. See Matter of Pell v. Board of Educ., 34 N.Y.2d 222, 240 (1974). Respondent was appointed to the Department on December 17, 1997. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

The Department has asked that Respondent be terminated, contending that he has irreparably breached the Department's trust by committing time abuse. Conversely, Respondent's counsel has argued that termination would be "ludicrous," based on Respondent's long and distinguished career with the Department and the nature of these charges.

The Department conceded that there were no known trial cases where a Department member was terminated primarily for time abuse (Tr. 521-22). Instead, the Department pointed to recent plea negotiations where officers were separated for time abuse.¹ For example, the Department cited *Case No. 2016-15986* (July 18, 2018). There, a 19-year lieutenant with no disciplinary history negotiated a settlement of 30 vacation days, 30 suspension days, an adjustment of 386 hours to his time/leave balance, and restitution of \$3,382.50, was placed on one-year dismissal probation, and agreed to file for vested-interest retirement after pleading guilty to:

¹ The Department cited one recent case, *Case No. 2018-18470*, but it has not yet been approved by the Police Commissioner and this Court has not considered it.

- (i) over course of 20 months, being absent from assignment without permission for approximately 386 hours and failing to submit leave of absence reports for lost time;
- (ii) submitting overtime reports for approximately 39 hours and 8 minutes for duties that were not performed during overtime hours;
- (iii) causing false entries in Department records with respect to said overtime reports;
- (iv) conducting personal business while on duty without just cause or permission;
- (v) changing scheduled tour of duty without authorization;
- (vi) failing to supervise subordinate officers over 19-month period; and
- (vii) failing to sign in and out for tours on 63 occasions.

The Department also cited *Case Nos. 2016-15987 & 2017-17306* (Dec. 14, 2017).

There, a 24-year year lieutenant with no history forfeited 30 vacation days, 30 suspension days, and a deduction of 1 hour and 41 minutes from time/leave balances; was placed on one-year dismissal probation; and agreed to file for service retirement for:

- (i) being absent from assignment without permission or necessity and failing to submit leave of absence report for lost time;
- (ii) failing to sign out at completion of scheduled tour on eight occasions;
- (iii) taking extended meal and conducting personal business while on-duty without permission;
- (iv) failing to supervise subordinate officers at times when he was absent without necessity;
- (v) changing scheduled tour without authorization on 76 occasions;

- (vi) failing to notify Department of his knowledge the supervisor in *Case No. 2016-15986, supra*, was regularly taking extended meals at a non-Department gym;
- (vii) discharging unauthorized off-duty firearm outside guidelines;
- (viii) wrongfully possessing and failing to safeguard said firearm; and
- (ix) failing to secure scene after this discharge.

These negotiated settlements are not particularly helpful in suggesting an appropriate penalty in the instant matter. First, there was no evidentiary record developed in these matters as there is in Respondent's case. Moreover, with respect to *Case No. 2016-15986*, the member in that case admitted to traveling by train to a non-Department fitness center on multiple occasions during regular working and overtime hours, as well as conducting personal business while on duty. *Case Nos. 2016-15987 & 2017-17306* involved an outside-guidelines firearms discharge with an unauthorized weapon. These are markedly different situations than the one at bar, where Respondent, who had permission to work a flexible schedule and any overtime necessary, was in a Department gym while on overtime because he did not structure his meal time appropriately on straight time during the course of what was often a 12-, 15- or 18-hour day.

Put simply, the Court, noting again the lack of evidence of any nefarious intent, does not view this case as a time theft situation warranting separation. Respondent, who was by all accounts a well-respected veteran supervisor and incredibly productive worker, put in a tremendous amount of hours almost every week and was given complete autonomy in structuring his schedule. It appears that as a result of this taxing workload, tremendous scheduling flexibility and lack of meaningful supervisory oversight over a period of fifteen months, Respondent became lax over time, not paying close attention to whether he was

taking meals on straight time or overtime and, as such, not always filling out overtime slips in a careful way that would have avoided questions of time abuse.

The Department presented no evidence that Respondent was spending hours on end at the gym, taking multiple meals, or intentionally not working on overtime. Instead, it seems that any improprieties could have been preemptively corrected with either a tour change, which Respondent had the flexibility to do himself, or through a conversation with a supervisor about breaks on extended tour overtime. There also is no evidence that any failures to sign the fitness center log were part of a scheme to keep the Department from knowing how often he was actually utilizing the gym or to steal time. In fact, Respondent is charged for several dates and specific periods of time when he did sign the log, after he seemingly corrected his earlier practice of never signing in.

Similarly, Respondent was not accurate in signing the command log and became engaged in a pattern of chronically leaving between 6 and 15 minutes before the end of his long days. Respondent's consistent pattern of early departures, though small increments of time in isolation and relative to the hours he was working, are concerning in a paramilitary organization where employees are expected to remain at work until the end of their tour unless otherwise authorized and accounted for, present and able to be called upon if needed an emergency. As outlined above, however, on many occasions Respondent continued work tasks in the annex garage before departing for the day from the garage, never taking the time to document those activities or return to the building so his swipe records would match his tour. This was a significant organizational and documentation failure on Respondent's part, but it did not constitute intentional time theft. Instead, it appears that Respondent simply did not want to go through the hassle of returning to the 12th floor having already swiped out.

The Court is not excusing the many liberties Respondent took with regards to accurate timekeeping. A veteran supervisor, who was completely trusted by his superiors to fashion his schedule almost however he liked and perform any overtime he deemed necessary, should have honored that trust with meticulous accuracy. Instead, Respondent, over a lengthy period of time, violated that trust by growing complacent and lax about when he took his meal and how accurately he documented his time, frequently departing before the end of his scheduled tour and submitting multiple documents certifying that he had worked blocks of overtime when he was actually in the gym, resulting in monetary compensation for time not worked.

Ultimately, though, this case has none of the markings of a situation where an officer was intentionally trying to fleece the Department out of time or, in overtime situations, out of money, by shirking work for which he was being compensated at an overtime rate.

Having carefully reviewed the record and all of the testimony and having considered the precedent and the arguments that the Department has put forth regarding termination, this Court is not inclined to dismiss an officer with over two decades of service, who was characterized as an asset with a tremendous work ethic by high-ranking supervisors, consistently received the highest performance evaluation rankings for many years and has had no disciplinary issues beyond a plea to criminal association in an incident that took place over 17 years ago (see Confidential Mem., *infra*).

A forfeiture of penalty days and a period of monitoring, however, is warranted to address Respondent's pattern of negligence with respect to accurate and careful timekeeping and ensure that such issues are fully corrected going forward. Such a penalty is consistent with those levied in other recent time and leave cases involving overtime. For example, see the following cases:

• *Case No. 2017-17224* (Aug. 17, 2018): 19-year deputy inspector with no history negotiated settlement of 65 vacation days, deduction of 126 hours and 36 minutes from time/leave balance, restitution of \$228.92 and one-year dismissal probation for:

- (i) being off-post on 37 occasions where she was compensated for 72 hours and 36 minutes, including 2 hours overtime, of time not actually worked;
- (ii) being absent without leave on 7 occasions for 56 hours;
- (iii) while commanding officer, leaving the city and state while on duty and failing to make proper notifications documenting whereabouts on 25 occasions;
- (iv) conducting personal business on Department time while using Department vehicle on 25 occasions;
- (v) failing to supervise executive officer over one-year period; and
- (vi) causing false entries to be made in precinct's command log by having sergeant sign her in and out on 37 occasions when she was not present for duty.

• *Case No. 2017-17100* (July 18, 2018): Nine-year officer forfeited 30 vacation days and was placed on one-year dismissal probation for:

- (i) being absent from or late for work on 27 occasions without permission and failing to submit leave of absence reports, resulting in improper receipt of 41 hours of straight time and 16 hours of overtime compensation;
- (ii) making inaccurate entries in command and activity logs as to time actually worked on 24 occasions;
- (iii) failing to sign in or out on roll call on three occasions;
- (iv) failing to make activity log entries on 10 occasions;

- (v) traveling to New Jersey while on duty to engage in non-Department business without permission for four hours;
- (vi) driving personal vehicle without permission to transport a fellow officer receiving medical treatment; and
- (vii) improperly submitting overtime slips on 18 occasions inaccurately stating that entire scheduled tour was worked.

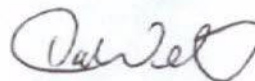
2 *Case No. 2016-16191* (Sept. 22, 2017): 29-year sergeant negotiated penalty of 45 vacation days, forfeiture of 80 hours and 44 minutes of time/leave balances, restitution of \$5,223.14, and was placed on one-year dismissal probation for:

- (i) improperly submitting 28 overtime reports and receiving cash payments for approximately 57 hours and 23 minutes of overtime that he did not perform;
- (ii) receiving straight time compensation for approximately 80 hours and 44 minutes that he did not work;
- (iii) failing to submit leave of absence reports for periods of time not present for duty on approximately 40 occasions;
- (iv) making false entries in activity log on approximately 46 occasions;
- (v) making false entries in command log on approximately 35 occasions;
- (vi) making false entries in movement log on approximately 44 occasions;
- (vii) misusing Department vehicle for non-Department related purposes on approximately 28 occasions;
- (viii) making false entries on overtime reports on approximately 27 occasions; and
- (ix) failing to document his movements in activity, movement or vehicle logs on approximately 25 occasions.

In the Court's view, suspension days are appropriate here because of the sheer volume of lapses in accurate timekeeping on both straight time and overtime. Suspension also is appropriate here because of Respondent's disregard for the trust placed in him by his supervisors in allowing him the unique privilege of setting his own schedule. In letting Respondent determine his hours, including whether overtime was necessary and when he would perform it, it was expected that Respondent would remain at work until the end of his tour, ready for mobilization if needed, and actually was working overtime during the blocks of time where he submitted for compensation. While the Department fell short of proving each specific occasion charged, the pattern that was established by the evidence indicates a troubling abuse of trust that is unacceptable in a paramilitary organization.

Accordingly, the tribunal recommends that Respondent be dismissed from the New York City Police Department, but that his dismissal be held in abeyance for a period of one year, pursuant to Administrative Code § 14-115 (d), during which time he is to remain on the force at the Police Commissioner's discretion and may be terminated at any time without further proceedings. The Court further recommends that Respondent serve 20 days on suspension without pay.

Respectfully submitted,



David S. Weisel
Assistant Deputy Commissioner Trials





POLICE DEPARTMENT CITY OF NEW YORK

From: Assistant Deputy Commissioner Trials

To: Police Commissioner

Subject: CONFIDENTIAL MEMORANDUM
LIEUTENANT JOHN PIZZANO
TAX REGISTRY NO. 921027
DISCIPLINARY CASE NO. 2017-17366

Respondent was appointed to the Department on December 17, 1997. His last three annual performance evaluations were as follows: 5.0 overall ratings of "Extremely Competent" for 2015, 2016 and 2017. He has received eight medals for Excellent Police Duty and two for Meritorious Police Duty. [REDACTED]

In 2003, Respondent pleaded guilty to criminal association and forfeited 20 vacation days.

In connection with the instant case, Respondent was modified on September 14, 2018, and subsequently placed on Level 1 Discipline Monitoring on October 1, 2018. This monitoring remains ongoing.

For your consideration.

David S. Weisel
Assistant Deputy Commissioner Trials